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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR TOPETE,

Defendant and Appellant.

A149801

(Contra Costa County  
Super. Ct. No. 51603554)

Appellant Victor Topete (Topete) was convicted by a jury of fleeing a pursuing peace officer while driving recklessly and against traffic (Veh. Code, §§ 2800.2, 2800.4); resisting an executive officer (Pen. Code, § 69); and being in possession of a controlled substance (Health & Saf. Code, § 11377), a smoking device (Health & Saf. Code, § 11364), and burglar's tools (Pen. Code, § 466). On appeal, Topete contends that the trial court erred in denying his *Batson-Wheeler*<sup>1</sup> motion; that it committed a prejudicial abuse of discretion and violated his constitutional rights by excluding fingerprint analysis result evidence; that the prosecutor committed prejudicial misconduct; and that he was denied his constitutional right to effective assistance of counsel. We affirm.

**BACKGROUND**

Topete was charged by information as follows: counts 1, 2, and 4—fleeing a pursuing peace officer while driving recklessly (Veh. Code, § 2800.2) and against traffic (Veh. Code, § 2800.4); count 3—assault on a peace officer with a deadly weapon

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<sup>1</sup> *Batson v. Kentucky* (1986) 476 U.S. 79, 97 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277 (*Wheeler*).

(Pen. Code, § 245, subd. (c)); counts 5, 7, and 8—resisting an executive officer (Pen. Code, § 69); counts 6 and 10—possession of burglar’s tools (Pen. Code, § 466); count 9—possession of a controlled substance (Health & Saf. Code, § 11377); and count 11—possession of a smoking device (Health & Saf. Code, § 11364). The information alleged a great bodily injury enhancement as to count 3 (Pen. Code, §§ 667, 1192.7); prior conviction enhancements (Pen. Code, § 667.5, subds. (b), (c)); and a prior strike conviction within the meaning of the Three Strikes Law (Pen. Code, §§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c)).

Topete pled not guilty and denied the enhancements. A jury found Topete guilty as to counts 1, 2, 4, 6, 9, 10, and 11; guilty of a misdemeanor as a lesser offense on count 5; and not guilty as to counts 7 and 8.<sup>2</sup> The jury found the prior convictions to be true, and Topete was sentenced to a term of six years and four months in state prison.

#### **I. Count 1: February 10, 2016**

On the night of February 10, 2016, Pittsburg Police Officer Willie Glasper responded to a suspicious vehicle call. The reporting party told police dispatch that a man had been sitting in a car for approximately three hours. When Glasper arrived at the scene, he saw a lone Hispanic male, whom he identified as Topete, sitting in a gold Nissan Maxima.

Glasper parked behind the Nissan and activated his car’s spotlight to illuminate the Nissan’s interior. Glasper was preparing to leave his patrol vehicle when the Nissan drove away at a high speed. Glasper activated the overhead lights and siren on his patrol vehicle, called dispatch, and drove after the Nissan. During the pursuit that followed, Topete sped recklessly, failing to stop at stop signs and red lights. Topete entered the highway and drove in excess of 85 miles per hour. Glasper chased Topete for about a mile and then terminated his pursuit for public safety concerns. Glasper notified the California Highway Patrol of the Nissan driving erratically.

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<sup>2</sup> Count 3 was dismissed prior to trial after Topete brought a successful motion to dismiss under Penal Code section 995.

Officer Daniel Buck of the Pittsburg Police Department also responded to the suspicious vehicle call on February 10, 2016. Buck drove by a gold Nissan Maxima and did a U-turn to get behind it and Officer Glasper's patrol vehicle. Buck identified the driver as Topete.

Police contacted the Nissan's registered owner, Maria Rodriguez, and she told police that she had given the car to her nephew, Topete, as a gift.

## **II. Counts 2 and 4: February 11, 2016**

On February 11, 2016, at approximately 2:09 a.m., Concord Police Officer Daniel Walker responded to an automotive burglary in Concord. When he arrived at the location, he saw a gold 1999 Nissan Maxima, which appeared suspicious because someone was sitting in the driver's seat, the car's engine was on, but all of its lights were off. Walker activated his patrol vehicle's spotlight and saw Topete sitting in the driver's seat. Topete turned on the Nissan's lights and sped away.

Walker tried to perform a traffic stop, but Topete sped through a residential area with a speed limit of 25 miles per hour at 50 miles per hour. As Walker pursued, Topete drove on the wrong side of the road, drove northbound on a southbound highway exit with his car lights off, and drove on the highway at 100 miles per hour. Topete exited the highway at the next exit, going 80 miles per hour in a 25-mile-per-hour zone, and then drove eastbound in the westbound street lanes. Topete got back on the highway and increased his speed between 100 and 105 miles per hour. He subsequently got off the highway and continued at high speeds in residential areas, "blowing through" stop signs.

After determining that Topete's driving was becoming increasingly reckless and dangerous, Walker pulled to the side of the road and ceased his pursuit.

Concord Police Officer Tony Zalec was also on duty that night and had been monitoring the actions of officers investigating a suspicious car trying to get away near Zalec's location. Zalec saw the police and the car approach and observed that the suspect drove a gold Nissan the wrong way against traffic. Zalec drove parallel to the Nissan for three seconds and shined a light through its windows to get a clear look at the driver, whom he identified as Topete. Topete then drove away onto the highway. Minutes later,

Zalec obtained Topete's photo from the police database and recognized him as the Nissan's driver, though Zalec had heard over the police radio that Topete was associated with the Nissan prior to the encounter.

### **III. Counts 5 and 6: February 13, 2016**

On February 13, 2016, at approximately 4:48 a.m., Pittsburg Police Officer Raquel Curran was alone on patrol in a residential neighborhood, looking for loiterers. She saw a gold Nissan Maxima, and Topete was sleeping in the driver's seat with a set of keys on the passenger seat. He woke up and looked at Curran after she knocked on the car's window. Topete started the engine and drove away. Curran followed him in her car as he sped, drove through a stop sign, and eventually pulled over in front of a residence. She saw Topete trying to jump a fence, exited her vehicle, pulled her weapon, and ordered Topete to stop. Topete ran away from Curran, then turned and ran back at her and then away from her again. Curran's body camera captured an image of Topete's face in her pursuit, which was played to the jury.

After Curran lost sight of Topete, she went back to the Nissan. She found keys with filed down teeth, which she identified as tools for car theft. She also found documents with Topete's name and address inside the Nissan, and some documents with the name "David Topete" on them.

Curran dusted the Nissan's driver's side door, window, rearview mirror, and seatbelt for fingerprints, and she submitted the four latent fingerprints she recovered for analysis. The prints were of sufficient quality for examination, and a police evidence technician transferred the latent fingerprints to a fingerprint examiner. Topete was not a match, and the fingerprints did not qualify to undergo an Integrated Automated Fingerprint Identification System search.

#### **IV. Counts 7–11: February 14, 2016**

Police went to Topete's residence on February 14, 2016, to arrest him. They were cautious because they believed there was a high probability that he would be violent and try to flee.

Topete was in the backyard when police arrived. When he saw the police, he ran and jumped over a side fence. An officer pursued Topete over the fence, and, on the other side of the fence, another officer attempted to grab Topete while he thrashed back and forth. Many officers attempted to restrain Topete, and one eventually used his taser to temporarily disable him. Police found a bag of methamphetamine, and a filed key, often used for car burglaries, on Topete.

### **DISCUSSION**

#### **I. The *Batson-Wheeler* Motion**

##### *A. Additional Background*

During voir dire, the prosecutor used a peremptory challenge to excuse prospective juror No. 3, an African-American woman. The court heard Topete's *Batson-Wheeler* motion and found that Topete had established a prima facie case for a discriminatory racial challenge.

When the court questioned the prosecutor regarding her reasons for using the peremptory challenge, she offered four justifications: (1) the prospective juror had been employed in human resources for many years at an airline company, and, in the prosecutor's experience, human resources personnel exhibited empathy and qualities she did not want in a juror; (2) the prospective juror had negative experiences based on disagreements with other jurors during deliberations from her prior service in the minority of a divided civil jury, and this caused the prosecutor to worry about her ability to get a unanimous verdict with this juror; (3) the prospective juror reacted physically when defense counsel mentioned police brutality in the news, and her reactions made the prosecutor believe she emphatically agreed that these issues were problems; and (4) the prosecutor preferred the prospective juror next in line because that juror had positive

experiences with law enforcement, had taken three cases to verdict, and had managerial skills.

The court found that the prosecutor's first three reasons were genuine, race-neutral reasons for challenging prospective juror No. 3; it did not address the fourth reason. The court accordingly denied Topete's *Batson-Wheeler* motion.

#### *B. Analysis*

The use of peremptory challenges to excuse prospective jurors based on race violates the federal and state Constitutions. (*Batson, supra*, 476 U.S. at p. 97; *People v. Gray* (2005) 37 Cal.4th 168, 184; *Wheeler, supra*, 22 Cal.3d at pp. 276–277.) A claim that the prosecutor has misused a peremptory challenge is evaluated as follows: first, a defendant seeking to challenge a prosecutor's peremptory challenge on constitutional grounds must show that the circumstances give rise to an inference that the challenge was purposefully discriminatory; second, if a defendant makes this prima facie showing, the burden shifts to the prosecutor to provide permissible, race-neutral justifications for the peremptory challenge; third, the court must determine whether the defendant proved the objectionable challenge was based on purposeful discrimination. (*People v. Huggins* (2006) 38 Cal.4th 175, 226–227.)

A prosecutor is presumed to exercise peremptory challenges in a manner conforming to constitutional requirements. (*People v. Cleveland* (2004) 32 Cal.4th 704, 732.) The prosecutor may exercise a peremptory challenge for any permissible reason, or for no reason at all, but if he or she provides an “ ‘implausible or fantastic’ ” justification for a peremptory challenge, the court may deem that justification to be a pretext for purposeful discrimination. (*People v. Huggins, supra*, 38 Cal.4th at p. 227.) In determining whether the prosecution's justification is pretextual, the proper focus of the court is on the subjective genuineness of the race-neutral reasons given, not on their objective reasonableness. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

We review the court's ruling on a *Batson-Wheeler* motion for substantial evidence (*People v. McDermott* (2002) 28 Cal.4th 946, 971), and we give deference to the court's ability to distinguish “bona fide reasons from sham excuses.” (*People v. Burgener*

(2003) 29 Cal.4th 833, 864.) The court’s conclusions are entitled to deference if it makes “a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.” (*Ibid.*) Here, the court found that Topete made a prima facie showing of discrimination, so we move directly to evaluating the prosecutor’s proffered explanations. (*People v. Trinh* (2014) 59 Cal.4th 216, 241.)

With respect to the prosecutor’s first justification, “[e]xcluding prospective jurors because of their profession is wholly within a prosecutor’s perspective.” (*People v. Landry* (1996) 49 Cal.App.4th 785, 791.) The prosecutor explained that her roommate worked in human resources, and she believed that people who work in human resources deal with sensitive issues and practice qualities, such as empathy, that she did not want on her jury. Although the prosecutor did not ask for prospective juror No. 3’s precise job title, the prospective juror did state that she had worked in the human resources profession for a decade, and respondent concedes that a prosecutor’s views of a profession, even if unrealistic, serve as a race-neutral basis for a peremptory challenge. (See *People v. Trinh, supra*, 59 Cal.4th at p. 242.) The court credited the prosecutor’s explanation, and substantial evidence supports this finding.

Next, use of a peremptory challenge against a witness who may harbor bias against the court system or who the prosecutor believes would not work well with other jurors has been found to be race-neutral. (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1329.) Topete contends a comparative juror analysis shows that the prosecutor’s second justification for challenging prospective juror No. 3 was pretextual because prospective jurors nos. 80 and 84 were on hung juries and went unchallenged. With a comparative juror analysis, we compare only the prospective jurors identified by Topete, and we apply the deferential substantial evidence standard of review. (See *People v. Lenix* (2008) 44 Cal.4th 602, 624–627.)

Prospective juror No. 3 described her prior experience with other jurors in jury deliberations to be negative, and said it left “a little distaste in her mouth.” In contrast, prospective juror No. 84 stated that his prior jury experience did not leave a bad taste in his mouth, and prospective juror No. 80 said that his prior jury experience was

interesting, not frustrating or positive or negative. Prospective jurors Nos. 80 and 84 did say that they experienced some frustration when the court asked them to continue deliberations to try to reach a verdict, but they did not state that they had negative experiences in their interactions with other jurors. Although prospective juror No. 3 opined that she could put aside her negative experience, she did say that she had this negative experience. Our comparative analysis thus does not cast doubt on the court's acceptance of the prosecutor's race-neutral explanation that she was concerned about prospective juror No. 3's negative interactions with, and ability to get along with, other jurors.<sup>3</sup>

Prospective juror No. 3's physical reaction to statements made by defense counsel about police brutality was the last neutral justification the court credited. A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. (*People v. Lenix, supra*, 44 Cal.4th at p. 613.) The prosecutor stated, "[w]hen [Topete's counsel] was questioning the juror about issues with police brutality and police being salient in the news, I made note that she made a huge head nod and sort of, I don't want to say rolled her eyes, but made a kind of gesture that made me feel that she emphatically agreed with the fact that [these] issues are problems in the news today." Because this case involved the use of police force, prospective juror No. 3's reaction gave the prosecutor pause. The court accepted this justification as genuine and race-neutral, and substantial evidence supports this finding. Although Topete claims that other prospective jurors nodded in response to the same statements and were not struck, the record does not support Topete's claim.<sup>4</sup> Topete did not satisfy

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<sup>3</sup> In addition, it is not at all clear that prospective jurors Nos. 80 and 84, who served on hung juries, are appropriate comparators for prospective juror No. 3, who was in the minority on a civil case that did reach a verdict. While prospective jurors Nos. 80 and 84 may have felt disappointed that they and their fellow jurors were unable to reach a verdict, prospective juror No. 3 had the distinctly different experience of having had her views rejected in favor of the majority returning a verdict with which she did not agree.

<sup>4</sup> Topete cites only to his counsel's argument during the *Batson-Wheeler* motion where counsel said, "There have been people nodding throughout, white people nodding



his burden to show that the prosecutor's justifications for challenging prospective juror No. 3 were pretextual.<sup>5</sup>

## **II. The Court Properly Excluded Fingerprint Analysis Result Evidence**

Topete argues that the court's exclusion of the result from the analysis of the fingerprints taken from his Nissan on February 13, 2016, constituted prejudicial error and violated his constitutional right to present a defense. Following cross-motions to exclude and admit this evidence, the court excluded the fingerprint analysis because it found that this evidence did not raise a reasonable doubt as to Topete's guilt, it showed a mere opportunity to commit a crime, and its introduction would cause undue consumption of time and confusion of the issues. We review a court's exclusion of evidence for abuse of discretion. (*People v. Chism* (2014) 58 Cal.4th 1266, 1291.)

First, Topete argues that the court erred in viewing the fingerprints analysis result as third-party culpability evidence, rather than exculpatory evidence. Topete's theory was that the fingerprints were relevant to establish that someone other than Topete drove the Nissan and committed the crimes at issue on February 10 and 11. Thus, the court did not err in viewing this evidence as third-party culpability evidence.

In any event, the nomenclature used to describe the fingerprint-analysis result evidence is not determinative. All third-party culpability evidence is exculpatory evidence. (See *People v. Hall* (1986) 41 Cal.3d 826, 834 (*Hall*) [referring to third-party

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throughout to various answers." Counsel's statement does not show that white prospective jurors who were not challenged nodded in response to his statements about police brutality on the news.

<sup>5</sup> Before denying the *Batson-Wheeler* motion, the court did not address the prosecutor's statement that she believed another juror would be better than prospective juror No. 3, nor does Topete address this reason on appeal. The court in *People v. Cisneros* (2015) 234 Cal.App.4th 111, 120–121, held that a prosecutor's statement that she had excused prospective jurors because she preferred the next prospective juror, without more, is not an adequate nondiscriminatory justification for the excusal. We need not consider whether a prosecutor's preference for another juror, standing alone, serves as a nondiscriminatory justification for excusal because Topete does not argue that the prosecutor's statement here suggested racial animus, and the statement does not detract from the race-neutral justifications the court accepted.

culpability evidence as a “kind of exculpatory evidence”].) “ ‘[T]he standard for admitting evidence of third-party culpability [is] the same as for other exculpatory evidence . . . .’ ” (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 790.) “[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evidence Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evidence Code,] § 352).” (*Hall, supra*, 41 Cal.3d at p. 834.)

To be admissible, the third-party culpability evidence need only be capable of raising a reasonable doubt as to the defendant’s guilt. (*Hall, supra*, 41 Cal.3d at p. 833.) “At the same time, we do not require that any evidence, however remote, must be admitted to show a third party’s possible culpability.” (*Ibid.*) “Evidence that another person had a motive or opportunity to commit the crime, without more, is irrelevant because it does not raise a reasonable doubt about a defendant’s guilt; to be relevant, the evidence must link this third person to the actual commission of the crime.” (*People v. Brady* (2010) 50 Cal.4th 547, 558.)

Here, no direct or circumstantial evidence links the fingerprints to the actual perpetration of the February 10 and 11 crimes. Although the police lifted the fingerprints from Topete’s car days after the crimes, no evidence established when the fingerprints were made. The most that the fingerprints could show is that, at some unknown time before the police dusted the Nissan for fingerprints, a person other than Topete had access to the driver’s side of the car and may have driven it. “[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant’s guilt.” (*Hall, supra*, 41 Cal.3d at p. 833.) On these facts, the inference that a third party, rather than Topete, drove Topete’s car during the commission of the crimes is wholly speculative. The fingerprints were properly excluded because they had no tendency in reason to raise a reasonable doubt as to Topete’s guilt. (*People v. Babbitt* (1986) 45 Cal.3d 660, 682 (*Babbitt*) [evidence which produces only speculative inferences is properly excluded as irrelevant]; see also *People v. Trevino* (1985) 39 Cal.3d 667, 696–697, disapproved on another ground in

*People v. Johnson* (1989) 47 Cal.3d 1194, 1221 [finding that an undated fingerprint on the victim's dresser could not support a murder conviction where the defendant had been the victim's guest, and guesswork as to when the print was made does not elevate speculation to the level of reasonable inference].)

Even if the fingerprint analysis result had marginal relevance, the court acted within its broad discretion in excluding it under Evidence Code section 352. A court's exercise of this discretion “ ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The court was justified in concluding that the limited probative value of this evidence was substantially outweighed by both the likelihood of confusing the issues and the undue consumption of time that its introduction would entail.

Because the court correctly exercised its discretion to exclude the fingerprint analysis result, such exclusion did not violate Topete's constitutional right to a fair trial. (*People v. Mills* (2010) 48 Cal.4th 158, 195 [the routine application of state evidentiary law does not implicate a defendant's constitutional rights]; see also *Babbitt, supra*, 45 Cal.3d at p. 684 [a defendant has no constitutional right to present irrelevant evidence].) Nor did the court's application of evidentiary rules impair Topete from presenting a complete defense: Topete introduced evidence that fingerprints were taken from the Nissan and sent out for analysis, and Topete' counsel argued to the jury that, had the fingerprints been a match for Topete, the prosecution would have introduced them. “When a trial court exercises its discretion to exclude evidence and does not abuse that discretion, the exclusion of the evidence (including proffered third party culpability evidence) does not impermissibly infringe on a defendant's federal constitutional rights.” (*People v. Shorts* (2017) 9 Cal.App.5th 350, 358–359.)

### **III. The Prosecutor Did Not Commit Misconduct**

Topete's final argument is that the prosecutor committed misconduct through the following statements in her rebuttal closing argument:

“[Prosecutor]: Now, it’s my burden of proof to prove all of the charges beyond a reasonable doubt, and you’ve already heard what that means. But the defense has the same subpoena power that I do --

“[Topete’s counsel]: Objection, improper argument.

“The Court: Okay. Everyone will remember that I read the instruction to you that [the] defense has no burden of proof in the case, so go ahead.

“[Prosecutor]: The defense has no burden of proof whatsoever. It’s my burden to produce the evidence to prove the charges beyond a reasonable doubt, but they have the same subpoena power. And you can think about logical witnesses that weren’t here. If the defendant apparently gave his car to someone else on February 10th and 11th, they could call that person, willing or unwilling, to get up in court.

“[Topete’s counsel]: Objection, burden shifting.

“The Court: Overruled.”

Topete asserts that this argument was an improper, thinly veiled reference to the excluded fingerprint analysis result, and that it shifted the prosecutor’s burden of proof to Topete. We disagree.

#### A. *Waiver*

Although respondent does not argue that waiver prevents us from reviewing Topete’s prosecutorial misconduct claim, Topete raises an ineffective assistance of counsel claim premised on his counsel’s failure to request an admonition following the purported prosecutorial misconduct. We thus first address whether the failure to request an admonition constitutes waiver.

“As a general rule a defendant may not complain of prosecutorial misconduct on appeal unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) This general rule does not apply if an objection or request for admonition would have been futile, nor does it apply when the court promptly overrules an objection and the defendant has no opportunity to request an admonition. (*People v. McDermott, supra*, 28 Cal.4th at p. 1001.)

Topete did not waive his prosecutorial misconduct claim. His counsel objected twice to the prosecutor’s argument that Topete had the power to subpoena witnesses. The court promptly responded to the first objection, and without being asked,

admonished the jury to remember that the defense had no burden of proof. Defense counsel's second objection on the same ground came directly after the prosecutor resumed her argument following the court's admonition, and the court quickly overruled this objection. The prosecutor also contemporaneously repeated to the jury that she had the entire burden of proof. In these circumstances, a request for an admonition was unnecessary as the court gave the curative admonition.

Indeed, respondent concedes that Topete has not waived his prosecutorial misconduct claim. This concession is significant because respondent acknowledges that it is proper for us to address the merits, and because respondent's concession suggests that, while Topete failed to seek an admonition, his request would have been unnecessary or the court's immediate ruling on his objections deprived him of the opportunity to make the requisite request. Respondent's concession, along with our review of the record, support the conclusion that Topete did not waive his prosecutorial misconduct claim.

#### *B. The Merits*

The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's behavior violates the federal Constitution when it comprises a pattern of conduct “ ‘ “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” ( *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ” ( *Ibid.*) Additionally, when the claim focuses upon comments that the prosecutor made before the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” ( *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another ground in *People v. Hill* (1998) 17 Cal. 4th 800, 823, fn. 1.)

No prosecutorial misconduct occurred here. In his closing argument, defense counsel argued forcefully that officers who identified Topete as the driver of the Nissan on February 10 and 11 misidentified him. In rebuttal argument, the prosecutor properly

commented on the absence of testimony from third-party witnesses stating that Topete gave them his car on the nights in question. (See *People v. Brady*, *supra*, 50 Cal.4th at pp. 565–566 [a prosecutor can comment on the defendant’s failure to call logical witnesses].) The prosecutor’s comment on the absence of testifying witnesses did not refer to the excluded fingerprint analysis result. The court did not exclude any defense witnesses, and there was no indication, unlike in *People v. Frohner* (1976) 65 Cal.App.3d 94, relied on by Topete, that a witness was unavailable to subpoena, and the prosecutor knew this. Considering the prosecutor’s comments in context, she did not act improperly.

Even if we construed the prosecutor’s comments to be a thinly veiled reference to excluded evidence, the comments were not impermissible. In each case Topete cites to support his argument that comment on excluded evidence constitutes misconduct, the evidence referred to was erroneously excluded. (See *People v. Varona* (1983) 143 Cal.App.3d 566, 569–570 (*Varona*) [prosecutor committed misconduct by arguing a “lack” of evidence after evidence was erroneously excluded]; *People v. Daggett* (1990) 225 Cal.App.3d 751, 758 (*Daggett*) [prosecutor “unfairly took advantage” of an erroneous evidentiary ruling by arguing for jurors to draw an inference that they might not have drawn if they had heard the excluded evidence]; *People v. Castain* (1981) 122 Cal.App.3d 138, 144, 146 [prosecutor committed misconduct in arguing that the evidence showed only one other incident of excessive police force after the court erroneously excluded an additional incident].) In contrast, where a prosecutor fairly comments on the evidence, following evidentiary rulings that are upheld, there is no misconduct. (*People v. Lawley* (2002) 27 Cal.4th 102, 156 [distinguishing *Varona* and *Daggett* as involving erroneous evidentiary rulings upon which the prosecutor improperly capitalized].) Here there was no erroneous evidentiary exclusion, hence no prosecutorial misconduct.

Nor did the prosecutor’s comments shift the burden of proof to Topete. The prosecutor is given wide latitude during argument, and the argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable

inferences, or deductions to be drawn therefrom. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 396.) Again, fair comment includes comment on the defendant's failure to call logical witnesses (*People v. Brady, supra*, 50 Cal.4th at pp. 565–566), and that is what the prosecutor did. Further, the judge here, as well as the prosecutor, told the jury numerous times that the prosecutor had the burden of proof and Topete had none. Consequently, it is not reasonably probable that the jury believed that Topete had any burden of proof.<sup>6</sup>

#### DISPOSITION

The judgment is affirmed.

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<sup>6</sup> Topete claims that his counsel provided ineffective assistance of counsel in violation of the federal Constitution by failing to request an admonition for the asserted prosecutorial misconduct. Our conclusions that the prosecutor did not commit misconduct and that Topete did not waive his right to challenge any alleged misconduct dispose of this claim. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1202, fn. 11 [counsel was not prejudicially deficient for failing to object to the prosecutor's comments where the prosecutor did not commit misconduct].)

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.